

**IN THE NAME OF THE REPUBLIC OF ARMENIA
DECISION OF THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF ARMENIA**

**ON THE CASE OF CONFORMITY OF PART 2 OF ARTICLE 16 AND PART 5 OF
ARTICLE 172 OF THE CRIMINAL PROCEDURE CODE OF THE REPUBLIC OF
ARMENIA WITH THE CONSTITUTION ON THE BASIS OF THE APPLICATION OF
ASHOT KUYUMJYAN**

Yerevan

July 2, 2019

The Constitutional Court composed of H. Tovmasyan (Chairman), A. Gyulumyan, F. Tokhyan, A. Tunyan (Rapporteur), A. Khachatryan, H. Nazaryan, A. Petrosyan,

with the participation (in the framework of the written procedure) of:

the representative of the applicant: advocate K. Mezhlumyan,

the respondent: A. Kocharyan, official representative of the RA National Assembly, Chief of the Legal Expertise Division of the Legal Expertise Department of the RA National Assembly Staff,

pursuant to clause 1 of article 168, clause 8 of part 1 of article 169 of the Constitution, as well as articles 22 and 69 of the constitutional law on the Constitutional Court,

examined in a public hearing by a written procedure the case on conformity of part 2 of article 16 and part 5 of article 172 of the Criminal Procedure Code of the Republic of Armenia with the Constitution on the basis of the application of Ashot Kuyumjyan.

The Criminal Procedure Code of the Republic of Armenia (hereinafter – the Code) was adopted by the National Assembly on 1 July 1998, signed by the President of the Republic on 1 September 1998 and entered into force on 12 January 1999.

Part 2 of article 16 of the Code, titled: “**Publicity of the Trial**”, stipulates:

“2. For protection of the privacy, honor and dignity of the persons participating in criminal proceedings and interests of the minors or the justice, as well as the state security, public order or morality, the participants in proceedings or their close relatives, the court may, at the request of the participants in the proceedings or on its own initiative, consider the case or the part thereof at closed session. The court shall consider cases at closed session also in other cases prescribed in this Code”.

The above-mentioned article of the Code was amended and supplemented accordingly by the Laws HO-91-N of 25.05.2006, HO-33-N of 17.03.2010, HO-69-N of 16.01.2018 and HO-211-N of 23.03.2018.

Part 5 of article 172 of the Code, titled: “**Obtaining and Preserving of Official and Commercial Secrets**”, stipulates:

“5. Evidence relevant to information on official, commercial or any other secret protected by law may be examined at a closed-door session of the court at the request of the persons who are threatened with the disclosure of the mentioned information”.

The above-mentioned article of the Code was amended and supplemented accordingly by the Laws HO-28-N of 14.12.2004, HO-114-N of 27.02.2007, HO-196-N of 22.10.2008, HO-103-N of 24.06.2010 and HO-115-N of 21.06.2014.

The case was initiated on the basis of the application of Ashot Kuyumjyan submitted to the Constitutional Court on 2 May 2019.

Having examined the application, the attached documents, the written explanation of the respondent and other documents of the case, as well as the Code, the Constitutional Court **FOUND:**

1. Applicant’s arguments

The applicant notes that the entire trial of his criminal case was conducted behind closed doors at the First Instance Court on the pretext of maintaining commercial secrets; therefore his right to a public hearing guaranteed by article 63 of the Constitution was violated.

The applicant believes that articles 16 and 172 of the Code contradict article 63 of the Constitution, insofar they provide the opportunity to conduct the entire trial of the criminal case behind closed doors in cases not envisaged in part 2 of article 63 of the Constitution, in particular for the protection of commercial secrets, since the mentioned norm does not contain any reference

to the protection of commercial secrets, which, in fact, is subordinated to the right of a person to a fair and public trial.

Based on the foregoing, the applicant requests to declare part 2 of article 16 and part 5 of article 172 of the Code contradicting article 63 of the Constitution and void in part of the possibility of considering the case behind closed doors in the case of protection of commercial secrets and in other cases not envisaged in part 2 of article 63 of the Constitution.

2. Respondent's arguments

The respondent refers to part 1 of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, according to which: "In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the privacy of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".

Referring to part 2 of article 63 of the Constitution, the respondent considers that the challenged provisions of the Code derive from the mentioned constitutional requirements; therefore, the framework of regulation of the latter cannot be in non-compliance with the provision prescribed in the Constitution.

The respondent also notes that the study of the judgment against the applicant rendered on 22.09.2017 shows that only one stage of the trial of the given criminal case was conducted behind closed doors.

The respondent considers that the alleged breach of the rights indicated by the applicant is not caused by the constitutionality of the challenged norms, and this is solely a question of legitimacy of application of the challenged norms. According to the respondent, the applicant did not submit the relevant justification regarding the unconstitutionality of the challenged provisions.

Based on the foregoing, the respondent considers that part 2 of article 16 and part 5 of article 172 of the Code are in conformity with the Constitution, therefore, the proceedings of the case must be terminated.

3. Circumstances to be ascertained within the framework of the case

For the determination of constitutionality of the provisions challenged in the present case, the Constitutional Court deems it necessary to consider only the issue of examining at closed-door session the evidence regarding the information constituting commercial secret, taking into account the circumstance that this provision was applied to the applicant only in this part, and also that within the meaning of part 2 of article 63 of the Constitution, the lawfulness of holding the court proceedings in camera depends on the specific type of information constituting secrets protected by law.

Based on the foregoing, the Constitutional Court, in order to determine the constitutionality of the challenged provisions, considers it important to address the following issues:

- Does the study in closed-door session of evidence constituting commercial secret comply with the requirements prescribed in part 2 of article 63 of the Constitution?

- Are the remedies chosen by the court for restricting the person's right to a public hearing of his\her case, i.e. is the consideration of evidence regarding the information constituting commercial secret in a closed-door session suitable and necessary for the achievement of one of the goals prescribed in part 2 of article 63 of the Constitution; is it proportionate to the meaning of the right to a public hearing of the case (article 78 of the Constitution), and also does it correspond to the principle of legal certainty (article 79 of the Constitution)?

4. Legal assessments of the Constitutional Court

4.1. Part 2 of article 63 of the Constitution establishes the possibility that in the cases and procedure provided by law, the court proceedings or a part thereof may be held in camera by a court decision, based on the need to implement the following constitutional goals:

- 1) protection of the privacy of the participants of proceedings;
- 2) protection of the interests of minors;
- 3) protection of the interests of justice;
- 4) protection of state security;

5) the protection of the public order;

6) protection of morals.

The Constitutional Court has repeatedly referred to the significance of the right to a public hearing as an integral part of the fundamental right to a fair trial, expressing, inter alia, the following fundamental legal assessments:

1. “According to article 19 of the RA Constitution, everyone shall have the right to a public hearing of his\her case within a reasonable timeframe by an independent and impartial court for the restoration of his\her violated rights. This right is also guaranteed by the European Convention on Human Rights (hereinafter referred to as the Convention), according to part 1 of article 6 of which, in the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time. Meanwhile, **the public trial** (in particular, public information about the court considering the case, the case subject to consideration, the place, time of the hearing, the procedure for the trial, etc.), as well as **the mandatory promulgation of the judicial act** are the minimum and important guarantees for the exercise of this right.

According to article 3 of the RA Constitution, as well as within the framework of the undertaken international commitments, the task of the state is to ensure the administration of justice according to the procedural rules which will ensure the legal term necessary for the implementation of the right to public trial, including also through the implementation of different procedural forms of the case consideration in the court, based on the peculiarities of the considered cases and the need to fair, immediate and efficient resolution of the latter”. (DCC-1020 of April 11, 2012);

2. “... the Constitutional Court considers it legitimate to consider the motions for investigative actions and the application of procedural coercion measures (including detention) in a closed-door session.

... the restriction on the publicity of judicial procedures is directly caused by the conditions prescribed in part 2 of article 63 of the RA Constitution regarding the protection of the privacy of the participants in proceedings, the interests of justice, as well as state security, public order or morals”. (DCC-1295 of September 2, 2016).

Based on the study of legal acts regarding this constitutional legal dispute, the Constitutional Court considers it necessary to note that part 5 of article 172 of the Code establishes the possibility

of studying in a closed-door session the evidence regarding the information constituting commercial secret, amongst other information constituting other secrets.

In the framework of the first sentence of part 2 of article 16 of the Code, the legislator, by merits reiterating the grounds for restricting the right to a public trial prescribed in part 2 of article 63 of the Constitution, envisaged the possibility for the court to conduct a closed-door court proceedings both at the request of the participants in the trial and at the initiative of the court. Meanwhile, in the framework of the legal regulation prescribed in part 5 of article 172 of the Code of, the legislator envisaged the possibility for the court to conduct closed-door court proceedings at the request of the persons threatened with the disclosure of information protected by law.

In this regard, the Constitutional Court states that the above legislative regulations show that the investigation in closed-door court proceedings of the evidence regarding the information constituting secret protected by law is aimed at the protection of the interests of the persons who are threatened with the disclosure of this information.

At the same time, the Constitutional Court states that the protection of commercial secrets in substantive law is mainly carried out within the framework of civil, criminal, and also labor legislation.

Thus, article 141 of the Civil Code, article 199 of chapter 21 of the Criminal Code on the crimes against property, the economy and economic activity, as well as article 122 of the Labor Code includes legal regulations on the protection of commercial secrets.

Examining the subject matter of this constitutional legal dispute in the context of procedural codes, the Constitutional Court states that, in accordance with article 17 of the Civil Procedure Code, for the purpose of protection of the **privacy** of the participants of the proceedings, **including commercial secrets**, interests of minors or justice, as well as national security, social order or morality, the court may, upon the motion of a person participating in the case or on its own initiative, examine the case or a part thereof in a closed-door session.

The regulation of the similar content is also prescribed in the Administrative Procedure Code, in particular, part 2 of article 8 of the Administrative Procedure Code establishes that for the purpose of protection of the **privacy of the participants of the proceedings, including commercial secrets**, interests of minors or justice, as well as national security, social order or morality, the court may, upon the motion of a person participating in the administrative proceedings or on its own initiative, examine the case or a part thereof in a closed-door session.

The Constitutional Court states that within the framework of procedural legislation, the commercial secret is subject to protection mainly as an element of the privacy of the participants in the proceedings, since the commercial secret, having real or potential economic value (commercial value), contains such information relating to any private person that are not publicly available, not accessible to other persons, and their secrecy is guaranteed by law and protected by the certain private individual. At the same time, part 2 of article 141 of the Civil Code establishes that the information, that cannot constitute commercial secret, shall be established by law.

Taking into account that legal regulations establishing commercial secrets are not challenged in the framework of the present case, the Constitutional Court states that there is a constitutionally justified need to protect commercial secrets in the procedural framework as information regarding the privacy of a participant in a proceeding.

Consequently, the Constitutional Court considers that the need to conduct a segment of a judicial proceeding in a closed-door session, regarding the study of evidence on the information constituting commercial secrets, is quite consonant with the goal of protecting the privacy of the participants in proceedings.

The Constitutional Court also notes that the constitutional goal of protecting the privacy of the participants in proceedings also includes the protection of commercial secrets, i.e. the state has to take measures to protect commercial secrets as a part of privacy.

In addition to the foregoing, the Constitutional Court considers it necessary to note that the disclosure of information constituting commercial secrets may have negative consequences not only in terms of protecting the interests of a particular person, but also in terms of protecting a number of constitutional values, in particular free economic competition as the basis of the economic order, as well as impede the implementation of the constitutionally prescribed basic goals of state policy in the economic sphere.

Based on the foregoing, the Constitutional Court states that although the term “commercial secret” is not directly prescribed in part 2 of article 63 of the Constitution, it is of fundamental significance for the privacy and economic activities of individuals, and its protection is a legitimate basis for the restriction of the fundamental right to public review.

In this aspect, the provisions prescribed in part 2 of article 16 and in part 5 of article 172 of the Code are in conformity with part 2 of article 63 of the Constitution, insofar as they prescribe the

possibility of examining in a closed-door session the evidence regarding the information constituting commercial secrets.

4.2. Referring to the issue of adhering to the principle of proportionality of restriction of rights and the principle of certainty, the Constitutional Court notes that the challenged regulations relate to the study in closed-door session of evidence regarding the information constituting commercial secrets, i.e. the restriction relates to a specific court session as a part of the case, during which the evidence regarding the information constituting commercial secrets should be investigated.

The Constitutional Court states that holding closed-door sessions during the examination of evidence is a necessary measure, since it makes possible the implementation of the goal of protecting the privacy of the participants to the proceedings and it is necessary to achieve this goal, since of all suitable measures, it minimally affects fundamental right to public review, and also prevents the availability to the public of information constituting commercial secrets and thereby ensures the implementation of the fundamental principle of free economic competition as an element of the economic order, and it is equivalent to the significance of the restricted fundamental right to public review.

The Constitutional Court also notes that the procedure for examining in a closed-door session of the evidence regarding the information constituting commercial secrets is certain in the aspect of the grounds and extent of the restriction of the right to public review, and the holders of this right are able to bring their conduct into line with the requirements of the challenged legal regulations.

Thus, the Constitutional Court considers that the study in closed-door session of evidence regarding the information constituting commercial secrets, as a measure chosen for the restriction of the fundamental right to public review, in the framework of the present case is consistent with the constitutional principles of proportionality and legal certainty.

4.3. Referring to the issue of examining in a closed-door session of the evidence regarding the information constituting commercial secrets, the Constitutional Court deems it necessary to consider it also from the perspective of compliance with the principles enshrined in international legal practice (article 81 of the Constitution).

In this aspect, the Constitutional Court attaches importance to the following legal positions expressed by the European Court of Human Rights (ECHR):

1. The principle of publicity of the trial is one of the fundamental principles of administering justice in a democratic society, the role and importance of which is that this principle is a serious guarantee for ensuring the legitimate activity of the court, and the presence of society and the media in the trial is restrictive factor for the court. According to the ECHR, this principle protects the participants of the proceedings from administering justice in secret and deprived of public control, and also provides confidence in the courts. Publicity and transparency of justice contribute to the objectives of part 1 of article 6 of the Convention, in particular, the administration of fair trials (**Gautrin and Others v. France, Judgment of 20 May 1998, Pretto and Others v. Italy, Judgment of 8 December 1983, Krestovskiy v. Russia, Judgment of 28 October 2010**);

2. The study of the jurisprudence of the European Court of Human Rights regarding the issue under consideration in the framework of this constitutional legal dispute indicates that the conduct of trial in a criminal case at closed-door sessions for the purpose of not disclosing to the public of information constituting commercial secrets, from the perspective of the right to a fair trial, is not considered problematic by the European Court of Human Rights.

Thus, for instance in the framework of the case *Shenoyev v. Russia* the ECHR confirmed the breach of the right to a public trial prescribed in part 1 of article 6 of the Convention, although considered it reasonable by the domestic court to conduct the trial at closed-door sessions for the purpose of not disclosing to the public of information constituting commercial secrets (**Shenoyev v. Russia, Judgment of 25 September 2018**).

Based on the foregoing, the Constitutional Court considers that the study of evidence regarding the information constituting commercial secrets at closed-door sessions is consonant with the practice of the ECHR.

Based on the examination of the case and governed by clause 1 of article 168, clause 8 of part 1 of article 169, and article 170 of the Constitution, as well as articles 63, 64 and 69 of the constitutional law on the Constitutional Court, the Constitutional Court **HOLDS:**

1. Part 2 of article 16 of the Criminal Procedure Code is in conformity with the Constitution in part of the study of evidence regarding the information constituting commercial secrets at closed-door sessions.

2. Part 5 of article 172 of the Criminal Procedure Code is in conformity with the Constitution in part of the study of evidence regarding the information constituting commercial secrets at closed-door sessions.

3. Pursuant to part 2 of article 170 of the Constitution this Decision shall be final and shall enter into force upon its promulgation.

Chairman

H. Tovmasyan

July 2, 2019

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